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AN APPROACH TO THE REGULATION OF SPANISH BANKING FOUNDATIONS

Miguel Martínez Muñoz



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AN APPROACH TO THE REGULATION OF SPANISH
BANKING FOUNDATIONS

*Miguel Martínez Muñoz**

ABSTRACT

The purpose of this paper is to analyze the legal framework governing banking foundations as they have been regulated by Spanish Act 26/2013, of December 27th, on savings banks and banking foundations. Title 2 of this regulation addresses a construct that is groundbreaking for the Spanish legal system, still of paramount importance for the entire financial system insofar as these foundations become the leading players behind certain banking institutions given the high interest that foundations hold in the share capital of such institutions.

Keywords: banking foundation; savings bank; transformation; monitoring and control.

* Research Assistant—Commercial Law Department at Universidad Pontificia Comillas. Associate Real Colegio Complutense at Harvard University.

I. INTRODUCTION

The purpose of Spanish Act 26/2013, of December 27th, on savings banks and banking foundations (“the Act” or “Act”) is to provide a solution for the financial problems affecting savings banks that arose in the course of the last decades.¹ In recent years, as set forth in the Preliminary Recitals of the Act, a strong intervention by public authorities has been required to clean up and restructure a large number of savings banks.² Their financial situation seriously compromised the entire financial stability in Spain.³ Within this framework, the new Act has foreseen the legislative character of foundations, which are *ad hoc* in nature with the purpose of enabling full separation of the banking activity from the welfare projects of savings banks, and thus the so-called banking foundations, which are the subject of this paper, emerged.⁴ Much of the wording of this Act is devoted to regulating banking foundations through the establishment of a system which is similar to that already envisaged for credit institutions in a complex environment, where State and regional powers intermingle, and where such issues defined as basic to the regulation of the Spanish credit sector are dealt with in a respectful manner.

In this regard, after having addressed the concept of banking foundation, the Act sets forth the events in which savings banks are to be transformed into such foundations, and it subsequently establishes a legal framework with the purpose of guaranteeing that banking foundations act upon the maximum levels of professionalism, independence, transparency and efficiency, and in no case may the solvency of the institutions in which they hold an interest be jeopardized.⁵ Additionally, it lays down certain provisions that shall only apply to foundations with a qualifying holding or a controlling interest in a

¹ Ley 26/2013, de 27 de diciembre, de cajas de ahorros y fundaciones bancarias (B.O.E. 2013, 13723) (Spain), available at <http://www.boe.es/boe/dias/2013/12/28/pdfs/BOE-A-2013-13723.pdf>.

² *Id.*

³ Enrique Rubio Torrano, *Fundaciones bancarias y cajas de ahorros*, 6 REVISTA DOCTRINAL ARANZADI CIVIL-MERCANTIL 31, 31–34 (2013).

⁴ I should clarify that the concept of “foundation” under Spanish Law differs substantially from the concept used in the common law system. According to Spanish Law, a foundation is an organization that has its own legal personality, incorporated as a non-profit organization, which allocates its assets on a permanent basis to the carrying-out of purposes of general interest. In this regard, every person, whether natural or legal, whether public or private, may set up a foundation by endowing the latter with assets or rights in order to comply with the foundation’s purposes.

⁵ Ley 26/2013, *supra* note 1.

credit institution, that is, it establishes a phased system with respect to the obligations of banking foundations.⁶

In this way, we change to a scene that is completely different from the previous one. Thus, the sector where savings banks, savings banks that individually or collectively pursued their financial activity through a bank,⁷ foundations that were *ad hoc* in nature, and institutional protection systems (*SIPs*, by their Spanish initials⁸) coexisted, becomes an arena where only savings banks, banking foundations and ordinary foundations coexist.⁹

II. THE CONCEPT OF BANKING FOUNDATION

Article 32 of the Act defines banking foundation as “a foundation that retains an interest in a credit institution reaching at least, whether directly or

⁶ *Id.*

⁷ Article 5 of Spanish Royal Decree-Law 11/2010, of July 9, 2010, foresaw the possibility that savings banks could develop their financial activities through a banking institution, to which they would hand over all their financial business, with them being the majority shareholders of the resulting credit institution. Real Decreto-Ley 11/2010, de 9 de Julio, de órganos de gobierno y otros aspectos del régimen jurídico de las Cajas de Ahorros, art. 5 (B.O.E. 2010, 11086) (Spain), available at <http://www.boe.es/boe/dias/2010/07/13/pdfs/BOE-A-2010-11086.pdf>. In such cases, savings banks would retain their status as credit institutions; they would exercise their social welfare projects in a direct manner and their financial intermediation functions through banking institutions in an indirect manner. *Id.* The difference between the indirect exercise of the financial activity and the possibility that savings banks could become foundations, which are *ad hoc* in nature, lies in the interest retained by a savings bank in the banking institution. *Id.* Thus, should a savings bank not reach 50% of the voting rights of the banking institution, it has to give up the authorization to act as a credit institution and proceed to its transformation into a foundation that is *ad hoc* in nature. *Id.*

⁸ Institutional Protection Systems or *SIPs*, by their Spanish initials, are clusters of several credit institutions set up under an agreement whereby all credit institutions making up the institutional protection system act jointly, following the instructions given by the core institution, which shall be, in any case, one of the credit institutions of the *SIP*. *SIPs* are regulated by Spanish Act 13/1985, of 25 May, on investment ratios, equity and reporting obligations of financial intermediaries. Ley 13/1985, de 25 de mayo, de participación de España en la Séptima Ampliación de Recursos de la Asociación Internacional de Fomento (B.O.E. 1985, 9680) (Spain), available at <http://boe.es/boe/dias/1985/05/28/pdfs/A15639-15643.pdf>.

⁹ See José María López Jiménez & Antonio Narváez Luque, *Ley de Cajas de Ahorros y Fundaciones Bancarias: la expulsión de las cajas de su paraíso financiero*, 8246 DIARIO LA LEY 1, 1 (2014); Rafael Hidalgo Romero & Lucía Piazza Dobarganes, *Consideraciones preliminares sobre la regulación proyectada de las fundaciones bancarias*, 11 REVISTA ARANZADI DOCTRINAL 27, 29–30 (2013). It is made clear that savings banks have gone from being key actors to merely playing a testimonial role in only five years, in such a manner that those remaining now, except two tiny entities which maintain the traditional structure of a savings bank, have made use of instrumental banks for the indirect performance of their financial activity pursuant to Spanish Royal Decree-Law 11/2010. Real Decreto-Ley 11/2010, *supra* note 7.

indirectly, 10 percent of the capital or voting rights of said institution, or entitling the foundation to appoint or dismiss members of its board.”¹⁰ The Act goes on to set forth that banking foundations shall have a social purpose and shall focus their main activity on welfare projects (“*obra social*”) and on an adequate management of their interest in a credit institution.¹¹ It also mandates that the name of these foundations shall include the phrase “banking foundation.”¹²

The Preliminary Recitals describe how the basic regulation of these foundations draws inspiration from foundations which are *ad hoc* in nature, as set out in Spanish Royal Decree-Law 11/2010, of July 9th, the purpose of which is to enable full separation of the banking activity from the welfare projects of savings banks.¹³ Additionally, stress is placed on the groundbreaking character of this construct with respect to the Spanish legal system, and a series of reasons to justify their regulation by the State are given.¹⁴ Indeed, chief among these reasons is that the Act considers banking

¹⁰ Ley 26/2013, *supra* note 1, art. 32.

¹¹ *Id.*

¹² *Id.*

¹³ Ley 26/2013, *supra* note 1, at 105878–83. In this regard, article 6 of Spanish Royal Decree-Law 11/2010, of July 9th, states:

1. Savings banks may agree to the segregation of their financial and social welfare activities through the scheme provided for in this Article in the following events:
 - a) In accordance with the provisions of paragraph 3 of the preceding Article.
 - b) As a consequence of surrendering the authorisation to act as a credit institution and in the remaining events of revocation.
 - c) As a result of the intervention of the credit institution according to the cases envisaged in Spanish Act 26/1988, of July 29th, on discipline and intervention of credit institutions.

To this end, they shall transfer all assets related to their financial activity to another credit institution in exchange for shares thereof and become foundations which are *ad hoc* in nature, thus losing their status as credit institutions.

The foundation shall focus its activity on the consideration and development of its social welfare projects, and to this end it may manage its securities portfolio. The foundation shall earmark the proceeds of funds, interest and investments conforming its assets to its social welfare purpose. Complementary to this, it may carry out the activity of promoting financial education.

2. The agreement to which the preceding paragraph is referred shall be subject to compliance with the requirements laid down for the setting-up of foundations and shall involve the transformation of the savings bank into a foundation that is *ad hoc* in nature. For its part, the segregation of the financial activity shall be governed by the provisions of Spanish Act 3/2009, of 3 April, on structural changes in trading companies.

¹⁴ Ley 26/2013, *supra* note 1, at 105878–83.

foundations to be a “key actor” present in the majority of credit entities in Spain, therefore the possibility exists that a malfunctioning of these institutions jeopardizes the stability of the entire financial system.¹⁵ On the other hand, insofar as these foundations hold a significant interest, and even a controlling interest, in financial institutions, the legislator cannot ignore the legal system thereof, hence establishing a regulation similar to that already set forth for the rest of the credit institutions in order to ensure an adequate credit regulation in Spain.¹⁶

In fact, before outlining the reasons for the convenience of regulating banking foundations, it is legitimate to wonder why these institutions have been created. Clearly the answer follows from a careful reading of the Act, for it can be seen that this regulatory text aims to control the size of savings banks in order to prevent them from being big enough to become systemic, which perfectly matches the requirements laid down in Point 20 of Appendix 2 to the Memorandum of Understanding on Financial-Sector Policy Conditionality, which established the commitment of the Spanish Government to prepare rules “to clarify the role of savings banks . . . in their capacity as shareholders of credit institutions with a view to a possible reduction of their interest to non-majority levels.”¹⁷

It is here where the origin and basis of banking foundations lies insofar as it is set forth that savings banks which grow beyond the legally allowed limits shall lose their banking license, shall transmit their financial activity to a credit institution, and shall be transformed into banking foundations.¹⁸ That is to say, banking foundations are created as a solution to the disproportionate growth of savings banks and to separate the financial activity from welfare projects. For such purposes, the Act establishes certain events in which transforming savings banks into foundations is mandatory.

In this regard, the aim is to control savings banks that acquire a certain size, but also to achieve full separation of financial activities from the welfare projects of savings banks. It should be kept in mind that savings banks are a sort of foundation-business that is *ad hoc* in nature, and within the

¹⁵ *Id.*

¹⁶ Rubio Torrano, *supra* note 3, at 32.

¹⁷ Juan Sánchez-Calero Guilarte, *Anteproyecto de Ley de cajas de ahorro y fundaciones bancarias*, 129 REVISTA DE DERECHO BANCARIO Y BURSÁTIL 324, 324 (2013).

¹⁸ Ley 26/2013, *supra* note 1.

classification of foundations, savings banks are considered mixed foundations for public-use and functional purposes.¹⁹ Therefore, savings banks are a type of foundation that develops a business activity in order to obtain enough resources earmarked for the fulfillment of the purposes of the foundation, which may be heterogeneous in nature, e.g. social, cultural, welfare purposes, etc. . . .²⁰ In this connection, the activity developed by a savings bank is mixed as it performs credit activities in the interest of its investors and, at the same time, it has a social purpose insofar as profits made are earmarked for the development of welfare projects.²¹

Thus, we can see here that there is some tension between the business risk entailed by the financial activity that the savings bank develops and the management of the assets held by the foundation from the perspective of the purposes of the foundation, which lead to a careful and, in all cases, conservative management of the assets owned by the institution.²² Indeed, with the new regulation offered by the Act, this tension between the “risk” financial activity and the “conservation” activity of the foundation will

¹⁹ On the legal nature of savings banks, see, *inter alia*, ROSARIO CAÑABATE POZO, EL RÉGIMEN JURÍDICO DE LA FUSIÓN DE CAJAS DE AHORROS 159–68 (2006); MANUEL ARAGÓN REYES ET AL., EL RÉGIMEN JURÍDICO DE LAS CAJAS DE AHORROS 120 (1991); Rafael La Casa García, *Los modelos de organización institucional de las cajas de ahorro*, 131 REVISTA DE DERECHO BANCARIO Y BURSÁTIL 7, 16–19 (2013); Juan Sánchez-Calero Guilarte, *El Real Decreto-Ley 11/2010 y la “mercantilización” de las cajas*, 121 REVISTA DE DERECHO BANCARIO Y BURSÁTIL 173, 177–79 (2011); José Miguel Embid Irujo, *El ejercicio de actividades empresariales por las fundaciones (fundación-empresa y fundación con empresa): su significado en el régimen jurídico de las Cajas de Ahorro en España*, 91 PERSPECTIVA DEL SISTEMA FINANCIERO 29, 29 (2007); Manuel Martínez Mercado, *Las cajas de ahorro: propiedad y ejercicio de las cuotas participativas ante el RD 11/2010. ¿Fin de su naturaleza jurídica?*, 121 REVISTA DE DERECHO BANCARIO Y BURSÁTIL 137, 140 (2011); Luis Díez-Picazo, *Sobre la naturaleza jurídica de las cajas de ahorro*, 8 REVISTA JURÍDICA UNIVERSIDAD AUTÓNOMA DE MADRID 199, 199–213 (2003).

²⁰ An analysis of the report prepared by Confederación Española de Cajas de Ahorro (“CECA”) on the 2012 welfare projects shows how in 2012, the last financial year for which there are data available, savings banks invested approximately 818.59 million euros in several welfare activities: social welfare and health care (48.4%), culture and leisure-time activities (29%), education and research (17.1%) and historical, artistic and natural heritage (5.5%). CONFEDERACIÓN ESPAÑOLA DE CAJAS DE AHORROS (CECA), *LA OBRA SOCIAL EN 2012* (2012), available at http://www.ceca.es/wp-content/uploads/2015/01/memoria_obra_social_2012.pdf.

²¹ See Francisco León Sanz, *La reestructuración del sistema financiero español: la transformación de las Cajas de Ahorro*, in LAS REFORMAS DE LAS SOCIEDADES COTIZADAS Y DEL SISTEMA FINANCIERO 2008–2009 1, 3 (2014); Manuel Titos Martínez, *La Obra Social de las Cajas de Ahorro y sus perspectivas de futuro*, 8 EXTOIKOS 67, 68–72 (2012) (compiling data concerning savings banks in the period 1947–2012 and concluding that in all these years, savings banks had a total profit amounting to 138.23 million euros, of which 25% was earmarked for welfare projects, that is, about 34.908 million euros).

²² León Sanz, *supra* note 21, at 4.

disappear to the extent that the first activity will be transferred to a bank and the second activity will remain that of the foundation, whether a banking or ordinary foundation, emerging from the transformation process. Thus, this earmarks all resources obtained by the foundation from its interest in the share capital of the bank for the development of all welfare activities.

III. WHEN DOES THE TRANSFORMATION INTO A BANKING FOUNDATION APPLY?

Articles 34 to 36 of the Act govern the obligation to transform savings banks and ordinary foundations into banking foundations.²³ Namely, article 34 provides the main reason behind the obligation of transformation, which we have already mentioned—that is, preventing the disproportionate growth of savings banks.²⁴ Indeed, the Act foresees transformation for these two specific events: (a) when the value of the total consolidated assets held by a savings bank, according to the last audited balance, exceeds the amount of ten billion euros; or (b) when its market share of deposits within the territorial sphere of action exceeds 35% of total deposits.²⁵ In addition to these two events, its Preliminary Recitals refer to a third event in stating that, apart from transformation in the events of exceeding the legally permitted limits, all savings banks that are performing their financial activity through a bank, that is, indirectly, upon the entry into force of the Act shall also be transformed.²⁶ The Act specifies that, in such cases, savings banks no longer perform a financial activity whatsoever and focus on welfare projects, hence the grounds for retaining the banking license in such events no longer pertain.²⁷ This reference in the Preliminary Recitals is reflected in the First Transitional

²³ Ley 26/2013, *supra* note 1, arts. 34–36.

²⁴ *Id.* art. 34.

²⁵ *Id.* art. 34.2. Article 34.3 specifies that if the institution belongs to a group for the purposes of article 42 of the Spanish Code of Commerce, the transformation events shall refer to the balance and consolidated accounts, therefore the transformation obligation shall apply to all savings banks in the group, which may transform into as many foundations as savings banks exist. *Id.* art. 34.3.

²⁶ *Id.* (citing Real Decreto-Ley 11/2010, *supra* note 7, art. 5).

²⁷ The Act describes these events as “anomalies.” *Id.* To this respect, see La Casa García, *supra* note 19, at 20.

Provision of the Act, which establishes a number of specific features for savings banks that perform their financial activity in an indirect manner.²⁸

Hence, if any of the two events of article 34.2 are present, a savings bank shall transfer all assets related to its financial activity to another credit institution in exchange for shares in the latter and shall initiate its transformation into a banking foundation, if all requirements under article 32 are satisfied, or into an ordinary foundation, and it shall lose authorization to act as a credit institution in both cases.²⁹ Thus, the banking foundation or ordinary foundation resulting from the transformation of a savings bank becomes a shareholder in the credit institution that receives the assets related to the banking activity of the savings bank, while the welfare functions are undertaken by the new foundation.³⁰

Table 1 below shows the restructuring process undergone by savings banks since 2009.³¹

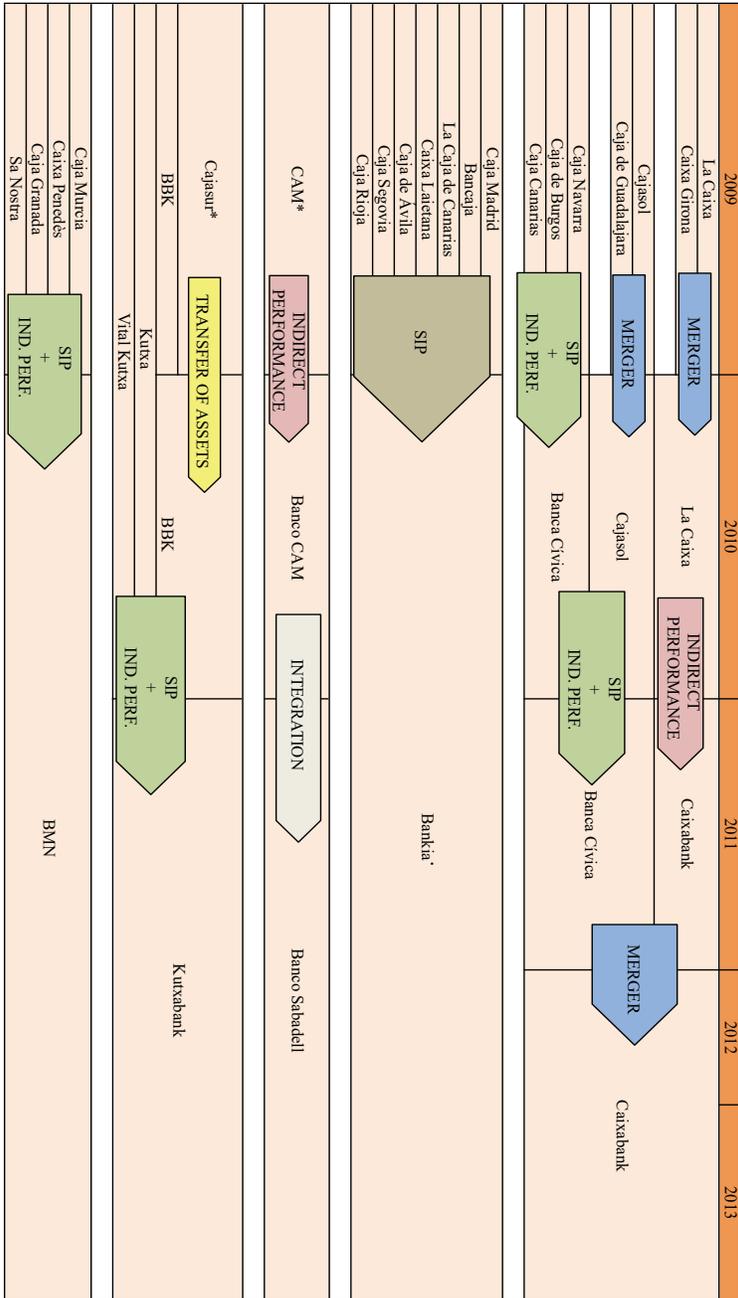
²⁸ The events envisaged in this provision are broadly as follows: (a) savings banks performing their financial activity in an indirect manner shall be transformed into a banking foundation or ordinary foundation within one year; (b) savings banks involved in a legal process of transformation into a foundation that is *ad hoc* in nature, as regulated in Article 6 of Royal Decree-Law 11/2010, of July 9th, shall have the term remaining to six months provided for in Article 35.2 of the Act after becoming involved in such legal process; (c) savings banks that have been involved in a legal process of transformation into a foundation that is *ad hoc* in nature for more than six months shall be transformed into a banking foundation or ordinary foundation within three months from the entry into force of the Act; (d) savings banks that are not involved in a legal process of transformation into a foundation that is *ad hoc* in nature but have initiated the process voluntarily shall be transformed into a banking foundation or an ordinary foundation within six months, and (e) in the events that time limits established to initiate transformation are not observed, the latter shall take place *ipso iure*, leading to the dissolution of all their bodies and their deletion from the Special Register of Credit Institutions of the Bank of Spain. Ley 26/2013, *supra* note 1, at 105907.

²⁹ Romero & Piazza Dobarganes, *supra* note 9, at 30–31 (“Taking into account the thresholds required . . . it can be concluded that such obligation shall apply to almost all current savings banks. Especially bearing in mind that the Fourth Transitional Provision [that of the Draft Bill] sets forth that savings banks which are performing their activity as a credit institution through a bank upon the entry into force of the Act (including the most important savings banks) shall also be transformed into banking foundations Therefore, only in exceptional cases the transformation obligation shall not apply, notwithstanding that such savings banks may transform voluntarily into banking foundations.”).

³⁰ Sánchez-Calero Guilarte, *supra* note 17, at 325 (describing the process behind the transformation of savings banks as a “growth crisis” in such a way that savings banks will become shareholders in a bank and will be transformed into banking foundations, subject to the general regulations governing foundations with the foundation not being regarded as a credit institution).

³¹ CONFEDERACIÓN ESPAÑOLA DE CAJAS DE AHORROS (CECA), PROCESO DE REESTRUCTURACIÓN, SECTOR DE CAJAS DE AHORROS: INFORME DE AVANCES (2014).

Table 1



* Taken over by the Bank of Spain (Act 26/1988)
 . Majority interest retained by FROB (Fund for the Orderly Restructuring of the Banking Sector)

2009	2010	2011	2012	2013
Caixa Sabadell Caixa Terrassa Caixa Manlleu	Unim PERFORMANCE	Unim Banc [*]	INTEGRATION	BRVA
Unicaja Caja Jaén	Unicaja INDIRECT PERFORMANCE	Unicaja Banco	INTEGRATION	Unicaja Banco
Caja España Caja Duero	Caja España de Inversiones, Salamanca y Soñá (CEISS)	Banco de CEISS	INTEGRATION	Unicaja Banco
Caixa Catalunya Caixa Tarragona Caixa Manresa	Catalunya Caixa	Catalunya Banc [*]		
Caixa Galicia Caixanova	Novacaixagalicia	Novagalicia Banco [*]		
CCM* Cajastur	TRANSFER OF BUSINESS Cajastur	SIP + IND. PERF.	Liberbank	
Caja de Extremadura Caja Cantabria				
Caja Inmaeulada de Aragón Caja Circulo de Burgos Caja de Badajoz	SIP + IND. PERF.	Banco Caja 3		
Ibercaja	INDIRECT PERFORMANCE	Ibercaja Banco	MERGER	Ibercaja Banco
Caixa Orlinyent Colonya Caixa Pollença				

* Taken over by the Bank of Spain (Act 26/1988)

• Majority interest retained by FROB (Fund for the Orderly Restructuring of the Banking Sector)

As it can be seen, much of the restructuring of the savings bank sector took place in the period 2010–2011 with the entry into force of the aforementioned Royal Decree-Law 11/2010, of July 9th, which introduced foundations that are *ad hoc* in nature and of which the Act is a follow-up.³² In this way, the current scenario has completely changed, given that 43 out of the 45 savings banks existing at the end of 2009 have taken part or are taking part in a consolidation process.³³ In terms of the average total asset volume, it represents 99.9% of the sector.³⁴ Moreover, the sector has evolved from being composed of 45 institutions, with an average size of 29.440 billion euros by the end of the year, to 13 institutions or groups of institutions, with an average asset volume of 90.286 billion euros by the end of 2013.³⁵

Today, only Caixa Ontinyent and Colonya Caixa Pollença retain their structure as savings banks, and if we analyze the financial results included in the audited accounting documents that have been published, we conclude that these two credit institutions are not subject to the obligation of transformation into a foundation, since none of the events stated in article 34.2 of the Act are present, nor they are savings banks that perform their financial activity in an indirect manner.

For their part, the remaining savings banks, already integrated into banks after having transferred their financial activity and, consequently, performing the activity in an indirect manner, shall initiate their transformation into banking foundations or ordinary foundations as provided for by the Preliminary Recitals and the First Transitional Provision of the

³² See López Jiménez & Narváez Luque, *supra* note 9, at 7 (“Act 26/2013 connects with the RDL 11/2010 to follow up and complete the framework of the indirect performance of the financial activity. In fact, as it cannot be withheld, banking foundations are the result of foundations that are *ad hoc* in nature, pursuant to RDL 11/2010 . . . the indirect performance of the financial activity was aimed at facilitating access through savings banks to top category resources on an equal footing with banks . . .”); José M. Domínguez Martínez, *La función social de las Cajas de Ahorros en la España de las Autonomías*, 2 EXTOIKOS 77, 79 (2011) (“The reform of the regulatory framework for savings banks adopted in July 2010 intended to offer a range of reasonable options: on the one hand, it allowed savings banks that comfortably met the capital requirements to preserve the traditional model; on the other hand, various schemes providing several methods to attract their own resources were enabled. Somehow, the approach adopted only endorses the concept of ‘biodiversity’ prevailing in the European Union, in the sense of not establishing pre-deterministic frameworks for the performance of the business activity in any sector, including the financial sector.”). See also Martínez Mercado, *supra* note 19, at 152.

³³ CECA, *supra* note 31, at 2.

³⁴ *Id.*

³⁵ *Id.*

Act.³⁶ Thus, the transformation of these savings banks which perform their activity indirectly into banking foundations shall apply if they retain an interest in a credit institution that reaches at least, whether directly or indirectly, 10% of the capital or voting rights of said institution, or that entitles the foundation to appoint or dismiss any members of its board.³⁷

Accordingly, if we analyze the financial information of big banks into which savings banks have been integrated, hence performing their financial activity in an indirect manner, the following conclusions can be drawn:

1. CaixaBank: In this financial institution, 64.37% of the share capital is held by Caja de Ahorros y Pensiones de Barcelona (La Caixa).³⁸ The remaining share capital is held by thousands of shareholders, but none of them holds 10% individually.³⁹ Therefore, La Caixa, with a holding greater than 10%, which is the percentage set *ex lege*, must be transformed into a banking foundation and, given its large ownership interest, which exceeds 50%, shall meet certain additional rules laid down by the Act that will be analyzed later on. Since the other two savings banks Cajasol and Banca Cívica (consisting of Caja Navarra, Caja Burgos and CajaCanarias) perform the activity in an indirect manner, they must be transformed into ordinary foundations given their small ownership interest in CaixaBank. Bankia: Its financial information shows that the institution is 100% held by the Spanish Fund for the Orderly Restructuring of the Banking Sector (*FROB*, by its Spanish initials), so that there is no room for the transformation of savings banks in this event.
2. Bankia: Its financial information shows that the institution is 100% held by the Spanish Fund for the Orderly Restructuring of the

³⁶ Ley 26/2013, *supra* note 1, at 105878–83, 105907. On the integration of savings banks into an institutional protection system and the indirect performance of the financial activity, see Martínez Mercado, *supra* note 19, at 153–55; La Casa García, *supra* note 19, at 19.

³⁷ Ley 26/2013, *supra* note 1, art. 32.1.

³⁸ CaixaBank, *Informe de Gestión y Cuentas Anuales 2013*, 52 (Feb. 27, 2014), <http://www.cnmv.es/AUDITA/2013/14921.pdf>.

³⁹ *Id.*

- Banking Sector (*FROB*, by its Spanish initials), so that there is no room for the transformation of savings banks in this event.⁴⁰
3. Banco Sabadell: Banco Sabadell took over Banco CAM, a credit institution through which CAM, a savings bank that was put into administration by the Bank of Spain, performed the financial activity indirectly.⁴¹ Upon the merger by acquisition, Banco CAM was wound up without liquidation, and all its assets were transferred directly to Banca Sabadell.⁴² Accordingly, it can be seen that CAM is not a shareholder of Banco Sabadell, so there is no need to consider whether it has to be transformed into a foundation or not.
 4. Kutxabank: Its financial information shows shareholders such as Bilbao Bizkaia Kutxa (BBK), with 57% of the share capital, and Caja de Ahorros y Monte de Piedad de Gipuzkoa y San Sebastián (Kutxa), with an ownership interest of 32%.⁴³ The remaining 11% is held by Caja de Ahorros de Vitoria y Álava (Vital).⁴⁴ As a result, since all savings banks exceed the 10% limit, they must be transformed into banking foundations, and BBK and Kutxa shall be subject to additional obligations given their high ownership interest.
 5. Banco Mare Nostrum (BMN): According to the last audited documents (2012), the stake in the share capital of the credit institution is as follows: the *FROB* holds 75.86%; Cajamurcia holds 7.41%; Caixa Penedés holds 5.06%; Caja Granada holds 3.25%; Sal Nostra holds 2.35% and the remaining stake is held by other shareholders, mainly bondholders.⁴⁵ Consequently, since all

⁴⁰ Bankia, *Cuentas anuales correspondientes al ejercicio anual finalizado el 31 de diciembre de 2013*, 8 (Feb. 18, 2014), <http://www.cnmv.es/AUDITA/2013/14861.pdf>.

⁴¹ Banco Sabadell, *Cuentas anuales consolidadas correspondientes al ejercicio anual terminado el 31 de diciembre de 2013* (Jan. 31, 2014), <http://www.cnmv.es/AUDITA/2013/14860.pdf>.

⁴² *Id.*

⁴³ Kutxabank, *Cuentas Anuales Individuales al 31 de diciembre de 2013 e Informe de Gestión*, 125 (Feb. 28, 2014), <http://www.cnmv.es/AUDITA/2013/14948.pdf>.

⁴⁴ *Id.*

⁴⁵ Banco Mare Nostrum (BMN), *Cuentas Anuales e Informe de Gestión correspondientes al ejercicio anual terminado el 31 de diciembre de 2012*, 4,107 (Mar. 26, 2013), <http://www.cnmv.es/AUDITA/2012/14358.pdf>.

- these savings banks do not reach the limits set in article 32 of the Act, they must be transformed into ordinary foundations.
6. Banco Bilbao Vizcaya Argentaria (BBVA): There are no savings banks holding an interest in BBVA, hence there is no transformation obligation in this case.⁴⁶
 7. Unicaja Banco: From its financial information it can be drawn that Unicaja (Monte de Piedad y Caja de Ahorros de Ronda, Cádiz, Almería, Málaga, Antequera and Jaén) holds 100% of the share capital.⁴⁷ Consequently, Unicaja must be transformed into a banking foundation and shall meet its obligation to submit all documents and information since it has complete control over the bank into which it was integrated.
 8. Catalunya Banc: The *FROB* and the Deposit Guarantee Fund hold 98.4% of the share capital, the remainder being spread among several shareholders.⁴⁸ Among them is Catalunya Caixa, which must be transformed into an ordinary foundation since it performs the financial activity indirectly, but does not reach the limits set by the Act so as to be transformed into a banking foundation.
 9. NCG Banco: According to the 2012 annual accounts, which is the last fiscal year filed, the *FROB* is the sole shareholder of NCG Banco.⁴⁹ Therefore, it is not necessary to analyze if there is a transformation obligation in this case.
 10. Liberbank According to the information retrieved, the most relevant shareholders include: Cajastur, with an ownership interest of 69.27%; Caja de Extremadura, with 13.85%, and Caja Cantabria, with 9.7%.⁵⁰ Therefore, Cajastur and Caja Extremadura must be transformed into banking foundations, since they exceed

⁴⁶ Banco Bilbao Vizcaya Argentaria (BBVA), *Cuentas Anuales e Informe de Gestión correspondientes al ejercicio anual terminado el 31 de diciembre de 2013* (Feb. 4, 2014), <http://www.cnmv.es/AUDITA/2013/14858.pdf>.

⁴⁷ Unicaja Banco, *Cuentas anuales al 31 de diciembre de 2013 e informe de gestión correspondiente al ejercicio 2013, 2* (Mar. 7, 2014), <http://www.cnmv.es/AUDITA/2013/14936.pdf>.

⁴⁸ Catalunya Banc, *Informe de Gestión de Catalunya Banc* (Mar. 26, 2014), <http://www.cnmv.es/AUDITA/2013/14970.pdf>.

⁴⁹ NCG Banco, *Cuentas Anuales correspondientes al ejercicio anual terminado el 31 de diciembre de 2012* (Apr. 23, 2013), <http://www.cnmv.es/AUDITA/2012/14303.pdf>.

⁵⁰ Liberbank, *Cuentas Anuales e informe de Auditoría correspondientes al ejercicio anual terminado el 31 de diciembre de 2013* (Feb. 26, 2014), <http://www.cnmv.es/AUDITA/2013/14924.pdf>.

the thresholds set *ex lege*. For its part, Caja Cantabria must be transformed into an ordinary foundation.

11. Ibercaja Banco: The financial information available shows that its main shareholder is Ibercaja (name of Caja de Ahorros y Monte de Piedad de Zaragoza, Aragón y Rioja), with 87.8%.⁵¹ The remaining 12.2% is held by Fundación Caja de Ahorros de la Inmaculada de Aragón, Fundación Bancaria Caja Círculo and Fundación Caja Badajoz.⁵² Thus, Ibercaja must be transformed into a banking foundation and shall meet the reporting requirements set forth in the Act for foundations whose ownership interest exceeds 50% of the share capital of the credit institution into which they are to be integrated.

As a result, we can see that the majority of savings banks that are performing their financial activity in an indirect manner must be transformed into banking foundations since they exceed the limits set in article 32 of the Act. Table 2 below shows an overview of the transformed savings banks:⁵³

⁵¹ Ibercaja Banco, *Informe de auditoría, cuentas anuales al 31 de diciembre de 2013 e informe de gestión del ejercicio 2013*, 1, 11 (Mar. 28, 2014), <http://www.cnmv.es/AUDITA/2013/14972.pdf>.

⁵² *Id.*

⁵³ Prepared by the author.

Table 2

Savings Bank	Banking Foundation	Ordinary Foundation	There is no transformation
Caixa Ontinyent			X
Colonya Caixa Pollença			X
La Caixa	X		
Cajasol		X	
Banca Cívica		X	
BBK	X		
Kutxa	X		
Vital	X		
Cajamurcia		X	
Caixa Penedés		X	
Caja Granada		X	
Sal Nostra		X	
Unicaja	X		
Catalunya Caixa		X	
Cajastur	X		
Caja de Extremadura	X		
Caja Cantabria		X	
Ibercaja	X		

With respect to the procedure to transform savings banks, as it is regulated in article 35 of the Act, we can draw the following shaping notes:

The savings bank's general meeting shall pass all resolutions to transform the savings bank into a foundation, adopt its bylaws, appoint the foundation's board members and determine the assets or rights of the savings bank to endow the foundation with. The transformation resolutions shall be adopted within six months from the very moment at which any of the events envisaged in article 34 is taking place.

If after expiration of the six-month period, the transformation has not been made, the direct dissolution of all bodies of the savings bank and its deletion from the special registry of credit institutions shall take place, thus the savings bank shall be transformed into a banking or ordinary foundation, as appropriate.

The supervisory department of the banking foundation shall appoint a managing committee so as to adopt its bylaws, appoint the foundation's board members, determine the assets or rights of the savings bank to endow the foundation with and pass all necessary resolutions and instruments.

The segregation of the financial activity shall be governed by Spanish Act 3/2009, of April 3rd, on structural changes in trading companies.

Once the transformation has taken place, no further official authorization will be necessary.

For its part, the Act also governs the transformation of ordinary foundations into banking foundations. This kind of transformation takes place when ordinary foundations, which are savings banks transformed pursuant to the provisions of article 34 of the Act that do not meet the requirements of article 32 so as to become banking foundations, acquire a stake in a credit institution that reaches at least, whether directly or indirectly, 10% of the capital or voting rights of said institution, or that entitles the foundation to appoint or dismiss any members of its board, that is, when ordinary foundations meet the requirements established to become banking foundations. Additionally, there can be ordinary foundations not arising from the transformation of savings banks that shall follow the procedure provided for in article 36 in order to be transformed into banking foundations if they are shareholders of a credit institution and exceed the limits of article 32 of the Act.

In either case, if the ordinary foundation acquires a stake in keeping with the characteristics set *ex lege*, whether it is derived or not from a prior transformation of a savings bank, it shall be obliged to follow the procedure and be transformed into a banking foundation. In this regard, the foundation's board shall pass all transformation resolutions by adopting the new bylaws and appointing the new foundation's board. The transformation resolution shall be reported to the supervisory department so that it can be ratified within two months and, in all events, it shall be passed within six months from the conclusion of the acquisition of the interest. Where there is no timely transformation, the foundation shall be dissolved and winding-up proceedings shall be opened.

To sum up, we can see that savings banks will experience a change in their legal status when they become banking or ordinary foundations on an exclusive basis (not credit institutions anymore), and at the same time shareholders of the credit institutions to which they transfer their financial

business when any of the events enabling transformation takes place.⁵⁴ Indeed, from the analysis carried out, it is concluded that all savings banks, except two, will have to be transformed into foundations, most of them into banking foundations and the rest into ordinary foundations. This means that new foundations will mainly focus on two tasks. On the one hand, they will manage their interest in the credit institution to which they have transferred the financial activity and, on the other hand, they will tend and develop the welfare activities. At this point, it is interesting to highlight how this new system will make banking foundations build mainly upon dividends received from the credit institution of which they are shareholders, and these resources will therefore be allocated to their welfare projects.⁵⁵ That is to say, welfare projects carried out by banking foundations will mostly be funded from part of the dividends received as a retribution for shares held in the capital of the credit institution, so that the intensity of work related to welfare projects will be determined by the good performance of the financial institution in which the interest is held, unless certain sales of packages of shares are made or funding is available in any other way.⁵⁶ So, to cope with the new legal

⁵⁴ On the difficulties that the insertion of foundations into a group of credit institutions entails, see José Miguel Embid Irujo, *La inserción de una fundación en un grupo de empresas: problemas jurídicos*, 278 REVISTA DE DERECHO MERCANTIL 1373, 1386 (2010). For its part, on the change in the nature of savings banks, see La Casa García, *supra* note 19, at 19 (“In a nutshell, through the contribution made, the relevant savings bank goes from being a real foundation-company to a foundation holding an interest—a controlling interest in the bank that conducts the financial business formerly belonging to such savings bank.”).

⁵⁵ Martínez Mercado, *supra* note 19, at 157 (“This foundation shall focus its activity on the consideration and development of its social welfare projects, and to this end it may manage its securities portfolio. The foundation shall earmark the proceeds of the funds, interest and investments that conform its assets to its social welfare purpose.”).

⁵⁶ López Jiménez & Narváez Luque, *supra* note 9, at 13. Likewise, it is interesting to bring up, although it refers to Royal Decree-Law 11/2010, the reflection made by Juan Sánchez-Calero Guilarte: “it is nonetheless true that some advocates of the pre-reform status quo [Royal Decree-Law 11/2010 in this case] invoked welfare projects as the *raison d’être* of savings banks, arguing that the reform proposals were aimed at hindering such social work. The reform has proved the fallacy behind this argument for, as we will see, it has established full compatibility between the business activity inherent in every credit institution and the development of such social work. This social work, however much relevance it had and it has, was not the essential and decisive criterion driving the management of savings banks, nor does it preserve such distinguishing function. The management of savings banks—such as any other credit institution—must be sound and prudent, that is, putting the solvency of the institution before any other objective as the guarantee of continuity and stability (which will affect, among other aspects, the programmes designed for the carrying-out of welfare projects). Only when there is solvency there is room for such social action where savings banks are, besides, exposed to significant competition from many other institutions. We stand witness to a generalisation of the so-called Corporate Social Responsibility,

structure, the Act establishes certain particularities with respect to the governing bodies of banking foundations, as well as certain monitoring and control mechanisms since, as we have already stated, foundations are key actors and a malfunctioning thereof may affect the financial system as a whole.

IV. GOVERNING BODIES OF BANKING FOUNDATIONS

The governing bodies of banking foundations are the foundation's board, the executive committees thereof provided for in the bylaws, the CEO and other bodies delegated by or receiving powers from the foundation's board which, as the case may be, are laid down in the bylaws according to the general foundations regulation.⁵⁷ As Spanish Act 50/2002, of December 26th, on Foundations, states that the foundation's board is the highest body that governs and represents the banking foundation, and it is in charge of compliance with the foundation's purposes and the management of its assets and rights.⁵⁸ Furthermore, article 38 of the Act states that this board shall be responsible for control, monitoring and reporting to the Bank of Spain.⁵⁹

The foundation's board shall be composed of the number of members set in the foundation's bylaws (although it may not exceed the number of fifteen members), always pursuant to the principle of proportionality depending on the volume of assets.⁶⁰ The foundation's board members may be natural or legal persons, of relevance in the sphere of action of the welfare projects carried out by the banking foundation and belonging, in all events, to any of the groups established in article 39.3 of the Act.⁶¹ As for board

which deprives of meaning the thesis that argues that a rapprochement towards corporate structures typically commercial involves giving up the important social action of savings banks." Sánchez-Calero Guilarte, *supra* note 19, at 182.

⁵⁷ Ley 26/2013, *supra* note 1, art. 37.

⁵⁸ Ley 50/2002, de 26 de diciembre, de Fundaciones (B.O.E. 2002, 25180) (Spain), available at <http://www.boe.es/boe/dias/2002/12/27/pdfs/A45504-45515.pdf>.

⁵⁹ Ley 26/2013, *supra* note 1, art. 38.

⁶⁰ *Id.* art. 38.1.

⁶¹ *Id.* art. 39.3. These groups are: a) founding persons or institutions, as well as those with a long tradition in the savings bank or banks, where appropriate, from which the assets of the banking foundation originates; b) institutions representing collective interests in the sphere of action of the banking foundation or of renowned standing therein; c) individuals, natural or legal persons that have provided the banking

members, they shall meet the requirements of commercial and professional repute of the Act, and shall possess the specific knowledge and expertise needed for the performance of their duties.⁶² Furthermore, insofar as the foundation's board members perform their duties solely for the benefit of the interests of the foundation and the performance of its social purpose, they may not perform similar functions in another office within the banking institution of which the foundation is a shareholder or in any other institution controlled by the group, if any.⁶³ Additionally, the Act reproduces articles 15.4 of the Act 50/2002, of December 26th, in establishing that a foundation's board member shall hold office for free, subject to the exceptions provided thereto.⁶⁴

foundation with significant resources or, where appropriate, the source savings bank; d) independent persons of recognised professional prestige in the fields relating to the performance of the social purposes of the banking foundation, or in sectors, other than the financial sector, in which the banking foundation may have relevant investments; e) persons who have specific knowledge and expertise in the financial field, who shall be part of the foundation's board by the percentage provided for by the secondary legislation adopted under this Act, and with a representative and increasing presence in accordance with the interest in the relevant credit institution. *Id.*

The foundation's board shall have, at least, one representative of each of the groups a), b), d) and e) above and, whenever possible, identify a significant contribution in the fifteen years prior to the establishment of the board, with at least a representative of the group c). To this end, a significant contribution shall be that representing more than 5% of the foundation's own resources. *Id.* Additionally, Article 39.4 states that the number of members of the foundation's board representing public administrations and institutions and public law corporations may not exceed 25% of the total. *Id.* art. 39.4.

⁶² *Id.* art. 40.1-2.

⁶³ *Id.* art. 40.3. Notwithstanding the provisions of Article 40.3, it can be seen how the Act softens its initial harshness through the Second Transitional Provision. Indeed, this provision foresees a temporary compatibility for such persons that, upon the entry into force of the Act, are simultaneously members of the management board of the savings bank and the banking institution through which the former performs its financial activity indirectly. In this way, compatibility is permitted temporarily, but subject to certain limits: a) under no circumstances these members shall perform executive duties in the bank and in the foundation; b) the number of compatible members in the credit institution shall not exceed 25% of the members of its management board; and c) the compatibility of each member shall remain until the end of their current term of office in the banking institution upon the entry into force of the Act, and in any case no later than June 30, 2016. *Id.* at 105908-09. On incompatibility, see Romero & Piazza Dobarganes, *supra* note 9, at 33 ("This incompatibility . . . entails the end of inconsistent practices in the form of duplicating the structure of positions in the governing bodies of savings banks and banks in which they hold an interest, representing an important limit to the rights of foundations as controlling or reference shareholders of the credit institutions in which they hold an interest."). In the same vein, see Juan Calvo Vérguez, *Las nuevas exigencias de saneamiento y de gobierno corporativo en la futura ley de cajas: luces y sombras*, 864 ACTUALIDAD JURÍDICA ARANZADI 9, 9 (2013), although this author raises the question of whether it would have been more convenient to limit the incompatibility exclusively to executive positions.

⁶⁴ Ley 26/2013, *supra* note 1, art. 40.4.

Bylaws shall govern the processes for the appointment of the foundation's board members and the number and duration of their terms of office as well as of the executive committees of the foundation's board, if any.⁶⁵ The Act establishes a limit in this point: a foundation's board members belonging to the group of individuals of recognized professional prestige in the fields relating to the performance of the social purposes of the banking foundation, or in sectors, other than the financial sector, in which the banking foundation may have relevant investments under article 39.3.d), shall not hold office for more than two consecutive terms and, in any case, for a period over twelve years.⁶⁶

Lastly, it should be highlighted that the chairman of the foundation's board shall be elected from among its members, representing the foundation at the highest level.⁶⁷ The CEO shall be appointed by the foundation's board, shall have a voice but not a vote, and they may not be a member of the foundation's board.⁶⁸ Moreover, a secretary shall be appointed, who may or may not be a member of the foundation's board, and shall be in charge of certifying all resolutions passed by the foundation's board.⁶⁹ If a secretary is a board member, they shall have a voice but not a vote.⁷⁰

These regulations show how the Act aims at consolidating a framework within which banking foundations act with the maximum level of professionalism, transparency, independence and efficiency to the extent that they are significant players in the Spanish credit system. Thus, their performance must be careful. It therefore involves overcoming the negative image of these savings banks, now converted into banking foundations, stemming from an atmosphere of collective discredit for which the political influence and degeneration of the exercise of such influence created. The professionalization of the governing structures, already initiated through Royal Decree-Law 11/2010 and continued through the Act, signifies the convenience of curbing such excesses and overcoming the cliché that banking foundations are "the happy retirement of some distinguished followers of one or another political party."⁷¹

⁶⁵ *Id.* art. 40.5.

⁶⁶ *Id.*

⁶⁷ *Id.* art. 41.

⁶⁸ *Id.* art. 42.1.

⁶⁹ *Id.* art. 42.2. See also Rubio Torrano, *supra* note 3, at 34.

⁷⁰ Ley 26/2013, *supra* note 1, art. 42.2.

⁷¹ Sánchez-Calero Guilarte, *supra* note 19, at 182.

V. ELEMENTS TO MONITOR AND CONTROL BANKING FOUNDATIONS

A. Protocol to Manage Financial Interest

Article 43 of the Act provides that banking foundations holding an interest equal to or higher than 30% of the capital of a credit institution, or an interest enough so as to enable them to control it, shall develop, either individually or jointly, a protocol to manage such financial interest.⁷² For this purpose, such regulation specifies that the ownership interest of all ordinary or banking foundations, which act in a concerted way in the same credit institution, shall be considered one; hence they shall develop the management protocol jointly.⁷³ The aim is to introduce a measure to monitor those institutions that, given their high interest in the share capital, exercise great control over a banking institution in order to prevent the serious consequences that might arise from a mismanagement of such interest.

The management protocol, its minimum content being determined by the Bank of Spain, shall contain, at least, the following aspects:

The basic strategic criteria governing the management of the controlling interest by the banking foundation.

The relationship between the foundation's board and the governing bodies of the credit institution in which it holds an interest, with particular reference to the criteria for the designation of board members.

The general criteria for the performance of transactions between the banking foundation and the credit institution in which it has an interest, as well as the mechanisms to avoid conflicts of interest.⁷⁴

This document shall be prepared by the foundation's board and submitted to the Bank of Spain for its evaluation and subsequent approval, taking full account of the influence of the banking foundation in the sound and prudent

⁷² Ley 26/2013, *supra* note 1, art. 43. *See also* Sánchez-Calero Guilarte, *supra* note 17, at 325 (“This document [the management protocol] is ground-breaking in our banking scenario, since it represents a sort of agreement between the shareholder (the banking foundation) and the company in which it holds the interest (bank) with respect to the use to be made of such interest, to the presence of the foundation representatives in the governing bodies of the bank and, finally, to the criteria established for the possible transactions between them.”).

⁷³ Ley 26/2013, *supra* note 1, art. 43.2.

⁷⁴ *Id.* art. 43.1a)–c).

management of the institution in which it holds an interest.⁷⁵ The protocol shall be made public and shall be reviewed at least once a year by the Bank of Spain, the institution responsible for the monitoring of the credit institution in which it has an interest.⁷⁶

B. Financial Plan

Apart from the development of the management protocol, banking foundations, which are in a situation similar to that described in the paragraph above, shall submit a financial plan to the Bank of Spain on an annual basis.⁷⁷ This plan describes how they will cope with the potential needs for capital that the credit institutions in which they hold an interest may have, as well as the basic criteria of their strategy of investment in financial institutions.⁷⁸ In its capacity as the monitoring body of these kind of institutions, the Bank of Spain shall assess the financial plan on the basis of the possible influence of the banking foundation on the sound and prudent management of the institution in which it holds an interest.⁷⁹

The minimum content of the financial plan shall be determined by the Bank of Spain, and in all cases shall contain, at least, the following features: a) Reasonable estimates of the needs for own resources of the institution in which they hold an interest in different macroeconomic scenarios; b) The foundation's strategy to obtain such resources in each scenario; c) The basic criteria of the strategy of investment in credit institutions.⁸⁰ As it can be seen, this is another control mechanism laid down for banking foundations in line with the importance that the Act attaches thereto in relation with the financial system.

Additionally, it is set forth that banking foundations holding an interest equal to or higher than 50% in a credit institution, or an interest enough so as to enable them to control it, shall accompany the financial plan by the following instruments:

⁷⁵ *Id.* art. 43.1.

⁷⁶ *Id.*

⁷⁷ *Id.* art. 44.1.

⁷⁸ *Id.*

⁷⁹ *Id.* art. 44.2.

⁸⁰ *Id.* art. 44.4a)-c).

- a) A plan to diversify investments and manage risks, which includes commitments so that the investment in assets issued by the same counterpart other than those with a high degree of liquidity and solvency does not exceed the maximum percentages over the total assets, pursuant to the provisions of the Bank of Spain.⁸¹
- b) The establishment of a reserve fund to meet potential needs for own resources of the credit institution in which they hold an interest that cannot be met from other resources and that, according to the Bank of Spain, may hinder compliance with their solvency obligations.⁸² To this end, the financial plan shall contain a schedule of minimum appropriations until the target volume established by the Bank of Spain according to a series of factors is achieved. Moreover, establishing a reserve fund shall not be a requirement in cases where a disinvestment program is integrated into the diversification plan, and this program shall include in detail all measures to be implemented by the foundation in order to bring its interest in the credit institution down to below 50% within a maximum of 5 years.⁸³
- c) Any other measure that, at the Bank of Spain's discretion, may be considered necessary to ensure the sound and prudent management of the institution in which the foundation holds an interest and the capacity of the former to comply with the regulation and discipline applicable thereto on a lasting basis.⁸⁴

C. Capital Increase and Dividend Distribution in Institutions Where an Interest Is Held

Additional Provisions Eight and Ten include measures that restrict the freedom to act of banking foundations holding an interest equal to or over 50%, or that enables them to control the credit institution in which they hold the interest.⁸⁵ In this regard, foundations with these interest levels resorting to capital increase processes may not exercise the political rights corresponding to the part of capital acquired enabling them to maintain a position equal to or over 50% or a controlling position. Nevertheless, the

⁸¹ *Id.* art. 44.3a). See also Calvo Vérguez, *supra* note 63, at 9–10.

⁸² This reserve fund shall be invested in financial instruments of high liquidity and credit quality, which shall be fully available at any time for its use by the foundation. Ley 26/2013, *supra* note 1, art. 44.3b). The events and method of use of the fund shall be determined by the Bank of Spain, and at all times shall be used in case of a significant decrease of the own resources of the institution in which it has an interest and as long as this decrease jeopardises compliance with the solvency regulations according to the regulating entity. *Id.*

⁸³ *Id.* See also Calvo Vérguez, *supra* note 63, at 10 (discussing to what extent the establishment of a reserve fund may end up undermining welfare projects and concluding that it will depend on whether it is permitted or not to derive revenues not only from dividends, such as interests in other companies).

⁸⁴ Ley 26/2013, *supra* note 1, art. 44.3b).

⁸⁵ *Id.* at 105906.

Bank of Spain may make an exception on the application of these measures in the events where the banking institution is in an early action process, which, in turn, may include the obligation of banking foundations not to increase or reduce their interest so as to avoid taking controlling positions.⁸⁶

On the other hand, resolutions on the distribution of dividends of the institutions where these kind of banking foundations hold an interest shall be subject to reinforced quorum and shall be adopted by a majority of at least two thirds of the share capital present or represented in the meeting.⁸⁷ The bylaws of the credit institution in which they hold an interest may increase this majority.⁸⁸ With this set of measures, the Act encourages banking foundations to gradually reduce their interest in credit institutions so that the restructuring process of the Spanish financial system is completed within a reasonable period of time, thus matching the requirements of the Memorandum of Understanding.

D. Public Administration Control

Regulations expressly governing the control system of banking foundations are laid down in title 2, chapter 5, articles 45–47 of the Act.⁸⁹ These regulations provide for control by the Supervisory Department, the Bank of Spain and a penalty system in case of breach of the obligations to provide information.⁹⁰ With respect to the control exercised by the supervisory department, the latter is expected to ensure the lawfulness of the establishment and operation of banking foundations, without prejudice to the tasks, which fall to the Bank of Spain.⁹¹ For banking foundations whose main performance goes beyond the scope of an Autonomous Community, supervision shall be carried out by the Spanish Ministry of Economy and

⁸⁶ *Id.*

⁸⁷ *Id.* See also Calvo Vérguez, *supra* note 63, at 10 (criticizing as “excessive and unjustified” the reinforced quorum as well as the majority needed to adopt the resolution on the distribution of dividends).

⁸⁸ Ley 26/2013, *supra* note 1, at 105906.

⁸⁹ *Id.* arts. 45–47.

⁹⁰ *Id.* In particular, article 47 of the Act characterises as a very serious infringement of the obligations under chapter 4, that is, obligations to submit the management protocol of the financial interest, the financial plan and other implementing measures for banking foundations holding an interest equal to or over 50%, enabling them to control the credit institution in which they hold such interest. *Id.* art. 47.

⁹¹ *Id.* art. 45.

Competitiveness.⁹² In the remaining cases, supervision shall be carried out by the relevant Autonomous Community.⁹³ The Act expressly provides that for the performance of the supervision functions set forth in article 35.1c), e), f) and g) of Act 50/2002, of December 26th, on Foundations, by the Spanish Ministry of Economy and Competitiveness, it shall be necessary that the latter obtains a previous report of the Autonomous Communities in which the banking foundation develops its welfare projects.⁹⁴

For its part, the Bank of Spain assumes a major role in the control system of the banking foundations insofar as it is the body in charge of monitoring credit institutions in which the former hold an interest pursuant to the provisions of Act 26/1988, of July 29th, on the discipline and intervention of credit institutions.⁹⁵ This measure is to assess the influence of banking foundations on the sound and prudent management of credit institutions.⁹⁶ In this regard, the Bank of Spain is responsible for controlling compliance with the regulations laid down for banking foundations with ownership interests over 30% and 50%, that is, banking foundations that are subject to submit the protocol to manage the financial interest and financial plan, as well as the special provisions provided for foundations that hold a controlling interest.⁹⁷ Finally, in order to perform its monitoring and control functions, the Bank of Spain shall be entitled to carry out any inspections and checks it may deem necessary, as well as to request the banking foundation to provide it with all necessary information in order to exercise its functions.⁹⁸

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* In this regard, a previous report by the Autonomous Communities for functions is needed to: c) advise foundations already registered on their legal, economic-financial and accounting framework, as well as on any issue relating to the activities undertaken by them in order to fulfil their purposes, providing them all necessary support to that effect; e) ensure effective compliance with the foundations' purposes, in accordance with the will of the founder, and taking into account the achievement of public-interest objectives; f) verify whether the foundation's economic resources have been applied to the foundation's purposes, requesting any information that might be necessary to this end, following an expert report prepared in the conditions legally established; and g) exercise the functions of the foundation's governing body on an interim basis if for any reason all persons designated to be a part thereof are not present. Ley 50/2002, *supra* note 58, art. 35.1.

⁹⁵ Ley 26/2013, *supra* note 1, art. 46.

⁹⁶ *Id.*

⁹⁷ *Id.* See *supra* Part V.B. for the Financial Plan requirements.

⁹⁸ Ley 26/2013, *supra* note 1, art. 46.2.

E. Corporate Governance Obligations

Lastly, it should be noted that the Act establishes that banking foundations make public, on an annual basis, a corporate governance report, which, at least, shall include the following:

- a) Structure, composition, operation and establishment of the policy for the appointment of governing bodies.
- b) Policy of investment in the banking institution: description of the exercise of the shareholding rights during such fiscal year.
- c) Other investments: actions and policy implemented.
- d) Mechanisms to avoid the retribution policy taking excessive risks and retributions received by the foundation's board, whether individually or jointly, and the general management, where applicable.
- e) Related transactions.
- f) Policy on conflicts of interest.
- g) Welfare activity developed.⁹⁹

The report shall be brought to the knowledge of the supervisory department and a copy thereof shall be submitted to the supervisory department.¹⁰⁰ Failure to produce or publish it, as well as the existence of omissions, false or misleading information, shall carry sanctions with a fine of up to 0.5% of the own resources of the foundation or up to 500,000 euros if such percentage is below this figure, as well as a public warning published in the Spanish Official State Gazette (BOE).¹⁰¹

VI. CONCLUSIONS

Of all aspects addressed in this paper, we can conclude that the entire regulation included in this new Act is aimed at maintaining a sustained financial system, with sound credit institutions that do not reach high levels so that they do not become systemic, thus complying with all the requirements provided for in the Memorandum of Understanding. Similarly, the Act aims at reducing the presence of savings banks in the financial

⁹⁹ *Id.* art. 48.2.

¹⁰⁰ *Id.* art. 48.1.

¹⁰¹ *Id.* art. 48.3.

landscape to the minimum and controlling and monitoring the new players on stage, banking foundations. These banking foundations may become, as it will actually happen, shareholders wielding considerable power in the credit institutions where they hold an interest as a result of the transfer of all assets relating to their financial activity to such credit institution in which they hold an interest. Indeed, the analysis shows how many of the new banking foundations will hold significant interests, even controlling interests, in banks of which they are shareholders. Thus, the monitoring and control mechanisms set forth in the Act shall be strictly observed in order to prevent any interference by the foundation in the management of the resulting credit institution.

In this way, the new financial landscape will include big banks, and some of their shareholders will be savings banks already transformed into banking or ordinary foundations, which will be focused on the management of their interest and in the development of welfare activities. Their funding shall be through dividends received by way of retribution for the interest that foundations hold in the financial institutions in which they are integrated, thus the intensity of work related to welfare projects will be determined by the good performance of the bank in question. Therefore, if welfare projects depend on the good performance of the financial institution in question and on the possible distribution of dividends, a potential distribution of available funds allocated for these activities may be hindered insofar as there were many and varied welfare activities that savings banks were carrying out.

As already noted, this regulation establishes a cascade system, establishing different monitoring and control levels as the interest that the banking foundation holds in the credit institution increases. This results in different obligations that range from the submission of a management protocol and a financial plan to an investment diversification plan, and the establishment of a reserve foundation to cope with the potential needs of owned resources of the credit institution. Moreover, limits are set with respect to the possibility of acquiring new shares in capital increases, which is in line with the intended progressive disinvestment of these institutions in the banks of which they are shareholders. All of this is within a context of rigorous monitoring by the supervisory department and the Bank of Spain.

To our mind, albeit all these measures deserve to be welcomed since they seek a sound and prudent management of the credit institutions remaining in the sector after the financial restructuring carried out in Spain. We believe that the level of requirement of the Act should be weighed and

assessed with respect to the requirements laid down by the Community and international institutions and contained in the Memorandum of Understanding, because the measures of the Act might be to a certain extent more restrictive than the latter, to the point of jeopardizing the exercise of the right of ownership of the foundation to the bank in which it has an interest in order to ensure an independent and professional management thereof.

Lastly, the new composition scheme of the foundation's board should be noted. This seeks the professionalization of the entire governing body and the absence of interference by politicians in these foundations, while providing for total incompatibility between the performance of the duties of the posts in the banking foundation and the financial institution. Indeed, despite this incompatibility, the control exercised by the foundation in the corresponding bank will be considerable given the high shareholding in some cases, which stresses the particular importance of the monitoring and control mechanisms established. It would make no sense for savings banks to be transformed into foundations in order to separate the financial activity from welfare projects if in the current situation, the former still control the financial business of the banks into which they are integrated.